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The Iraqi Use Of Chemical Weapons Against The Kurds: A Case Study In The Regulation Of Chemical Weapons In International Law

I. Introduction

"Unless the world family of nations stands firm against the use of poison gas, that dreadful weapon could become increasingly common in regional conflicts."¹ The world has experienced a proliferation in the production and use of chemical weapons in the past two to three decades.² There have been numerous incidents of chemical weapon employment throughout the world, especially in the Iran-Iraq War. This frequent use has resulted in the breakdown of the moral prohibitions that have held the horrors of chemical weapons in check for the last seventy years.³ The taboo on the use of chemical weapons has been weakened, if not destroyed. No better evidence of this phenomenon exists than Iraqi President Saddam Hussein's recent threat to use chemical weapons in the current Persian Gulf crisis.⁴

Iraq frequently employed chemical weapons against Iran during the Persian Gulf War; even more horrific was its use of these weapons against its own population.⁵ During 1988 Iraq used poison gas on

1. Smolowe, *Where is the Outrage?*, TIME, Sept. 26, 1988, at 36.

2. ASSOCIATION OF THE U.S. ARMY, CHEMICAL WARFARE — A REAL AND GROWING THREAT (Special Report 1989). The following countries are known to have or are strongly suspected of having chemical weapons: U.S., U.S.S.R., France, Israel, Egypt, Ethiopia, China, North Korea, Taiwan, Vietnam, Burma, Iran, Iraq, Syria and Afghanistan. It is likely that the following countries have chemical weapons: Libya, Somalia, Cuba, Chile, Pakistan, Thailand, Republic of Korea and South Africa. *Id.*

3. D. HARRISON & J. ROBERTS, UNITED STATES NATIONAL STRATEGY AND DEFENSE POLICY OBJECTIVES AFTER CHEMICAL DISARMAMENT at 1 (U.S. Army War College Study Project, March 19, 1989) [hereinafter HARRISON & ROBERTS].

4. Daily Telegraph (London), Sept. 7, 1990, at A25, col. 3. In early August, 1990, Iraq invaded Kuwait. Within twelve hours Kuwait was brought to its knees by Iraq's proficient war machine. Iraqi motives for invading included money and regional dominance. Beyer, *Iraq's Power Grab*, TIME, Aug. 13, 1990, at 16, col. 1. A few weeks later, Iraq was surrounded by a multi-national force based in Saudia Arabia and was isolated by a United Nations-sponsored naval blockade. *George Bush, Diplomat*, U.S. NEWS & WORLD REPORT, Sept. 10, 1990 at 26.

Hussein's threat to use chemical weapons is not an idle one. Iraq has deployed chemical weapons with its forces occupying Kuwait. It also has an estimated 200 long-range missiles capable of launching a chemical weapons strike from within Iraq. *Missile Strike Against Iraq Mulls On Hill*, Washington Times, Sept. 10, 1990, at A6, col. 4.

5. *UN Team Says Chemical Agent Used in Gulf War*, Washington Post, March 27, 1984, at A1, col. 5. Iraq used chemical weapons repeatedly against Iran during the war.

its Kurdish population a number of times, with horrifying results.⁶ Iraq's March 1988 bombing of the city of Halabja with mustard gas, cyanide gas and nerve gas left hundreds, perhaps thousands, of bloated Kurdish bodies littering the streets.⁷ No country has challenged these major acts of genocide.⁸ In spite of the senseless brutality of the Iraqis, the world has remained strangely silent. This silence gives the impression of indifference.⁹ It also suggests that chemical warfare is acceptable, especially against a minority group such as the Kurds.

The Kurds are a non-Arab ethnic group with a distinct language, culture and history.¹⁰ The Kurds number about twenty million.¹¹ They inhabit a vast mountain area, popularly known as Kurdistan, that stretches from Turkey through northern Iraq into Iran, and includes small areas of Syria and the Soviet Union.¹² The Kurds are fierce, combative mountain people who have been fighting for a nation of their own for centuries.¹³

This Comment will examine the international law regulating chemical weapons and apply that law to the Iraqis' use of chemical weapons against their own population in a civil war. Specifically, this Comment will analyze and highlight the shortcomings of international conventions, customary international law, and general principles of law dealing with chemical weapons. The main focus will be on the inadequacies of the The Geneva Protocol of 1925.¹⁴ The Protocol does not address the use of chemical weapons directed against dissident domestic elements.¹⁵ It also lacks any compliance provi-

Bombings in January and February, 1986, resulted in the treatment of 8500 casualties, 2500 of whom were hospitalized suffering from sulfur mustard burns. The U.N. has documented six instances of chemical weapons use. *Id.*

6. Pitt, *Post-Gazette*, Sept. 26, 1989, at 1, col. 4.

7. Smolowe, *Return of the Silent Killer*, *TIME*, Aug. 22, 1988, at 46. Halabja was a thriving trading center in northeastern Iraq and was the center of Kurdish resistance. *U.S. NEWS & WORLD REPORT*, April 4, 1988, at 11.

8. Smolowe, *supra* note 7, at 47.

9. Obtaining international censure is difficult in the context of chemical warfare. Nations that are not directly involved find it easier to ignore the allegations rather than pursue them, especially if there is no direct evidence of the usage. Note, *Establishing Violations of International Law: "Yellow Rain" and the Treaties Regulating Chemical and Biological Warfare*, 35 *STAN. L. REV.* 257, 285 (1983).

10. Sciolino, *Kurdish Chief Gains Support In U.S. Visit*, *N.Y. Times*, June 22, 1988, at A3, col. 1.

11. *Id.* at A3, col. 2.

12. *Id.*

13. Barnes, *Kurds Locked In One More Losing War?*, *U.S. NEWS & WORLD REPORT*, Nov. 9, 1987, at 55. The Kurds are one of the largest nations in the contemporary world still denied an independent state. Some regard this continuing struggle as a romantic cause while others find it futile and doomed to failure. A. HYMAN, *ELUSIVE KURDISTAN: THE STRUGGLE FOR RECOGNITION* 1 (Conflict Studies No. 214, Sept. 1988).

14. Geneva Protocol of 1925, 26 *U.S.T.* 571, *T.I.A.S.* No. 8061, 94 *L.N.T.S.* 65.

15. *Id.* The Geneva Protocol of 1925 states that "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world" and that the "high contracting parties

sions. There has been no other significant multilateral agreement on chemical weapons since 1925, although a forty-nation Conference on Disarmament has been meeting in Geneva since 1984 to draft a total ban on chemical weapons.¹⁶

This Comment also analyzes the applicability of the Geneva Protocol and customary international law to military action directed against rebellious elements within a country.¹⁷ Some scholars have deemed the prohibition against using chemical weapons to be a declaration of customary international law, especially the customary laws of war, which would also apply to non-international conflicts.¹⁸ The Iraqi actions against the Kurds are also a grave violation of international humanitarian law, specifically, the United Nations Charter, The Universal Declaration of Human Rights, the Genocide Convention of 1948, the Geneva Conventions of 1949, and Protocols I and II.¹⁹ It is clear that the Iraqis violated international law when they gassed thousands of Kurds.

This Comment will also discuss suggestions for more effective regulation, such as a total-ban treaty with effective verification and compliance provisions, to ensure that there will be no repetition of the Kurdish massacres.²⁰ The efficacy of forming a permanent international investigatory body will be analyzed. The importance of enforcement of the ban on the export of the technology and chemicals necessary to make poison gas will also be noted.²¹ An effective ban on the export of chemical weapon technology will halt the proliferation of chemical weapons to countries like Iraq which have no compunction against using them.

Despite the fact that the gassing of the Kurds was a violation of humanitarian international law, there have been no diplomatic, economic or military reprisals. The international community must now make a choice: get tough on chemical weapon use or witness the proliferation and use of poison gas.

... accept this prohibition." *Id.* The Iraqi reservation to the Protocol states that "The Iraqi Government shall be bound by the provisions of the protocol only with respect to the States which have both signed and ratified it . . . and shall not be bound by the protocol with respect to any enemy state whose armed forces or whose allies fail to respect the provisions of the protocol. *United States: Ratification of the 1925 Geneva Protocol For The Prohibition Of The Use In War Of Asphyxiating, Poisonous Or Other Gases, And Of Bacteriological Methods Of Warfare*, 14 I.L.M. 49 (1975) [hereinafter *U.S. Ratification of the 1925 Geneva Protocol*].

16. N. SIMS, INTERNATIONAL ORGANIZATION FOR CHEMICAL DISARMAMENT 5 (1987).

17. N.Y. Times, Sept. 13, 1988, at A1, col. 3.

18. ANN THOMAS & A.J. THOMAS, JR., LEGAL LIMITS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS 49 (1970).

19. See *Murder Within Sovereign Boundaries*, N.Y. Times, Sept. 5, 1988, at 20, col. 1.

20. HARRISON & ROBERTS, *supra* note 3, at 16.

21. See U.S. NEWS & WORLD REPORT, April 4, 1988, at 11.

II. Iraq's Use Of Chemical Weapons

One writer described the bodily effects of nerve gas, one of the gasses used against the Kurds, as follows:

First, one detects an odd odor, something like the scent of garlic. Then the burning sets in, blurring vision as the eyes begin to smart and itch. Uncontrollable bouts of sneezing and coughing follow, often attended by nausea and vomiting. As the hours crawl by, the inflammation slowly spreads. When it reaches the respiratory tract, swelling the internal lining, the breath shortens and the chest tightens. The skin darkens to a sickly purplish color, the armpits and other cavities turning almost black. Excruciating blisters appear on the neck, chest and thighs, causing patches of skin to fall off. Large lesions discolor the genital area. For some, the blisters and the terror eventually fade, although they may be plagued by side effects like bone-marrow or gastrointestinal problems for years to come. Others perish quickly, the silenced victims of a silent killer.²²

The Iraqi government of Saddam Hussein has acted ruthlessly towards the Kurds, who have been fighting for autonomy for the last seventy years.²³ Because the Kurdish guerrillas were armed and financed by Iran during the Iran-Iraq war, Iraq considers the Kurds traitors.²⁴ Since 1987, Iraqi forces have razed villages and deliberately depopulated the region of Kurdistan.²⁵

The most horrifying tactic employed by Iraq against the Kurds has been the use of chemical weapons.²⁶ Sixty-seven chemical weapon attacks were reported from April 1987 to April 1988, directed against both Kurdish civilians and the Kurdish guerrillas who call themselves *pesh mergas*.²⁷ The most dramatic poison gas attack

22. Smolowe, *supra* note 7, at 1.

23. The Reuter Library Report, Sept. 4, 1988 (LEXIS, Nexis library, Intl file). It has been reported that although the Kurds have survived the fighting of the past seventy years, this time they have received a beating from which they might never recover. *Id.*

24. N.Y. Times, Sept. 8, 1988, at A16, col. 1.

25. A. HYMAN, *supra* note 13, at 14. It has been estimated that, as of 1987, 3,000 villages have been destroyed. *Id.* Kurdistan means "the land of the Kurds." The region that was known as Kurdistan after World War One was divided up by the regional powers — Iran, Iraq, Turkey, Syria and the Soviet Union. *Id.*

26. Iraq has the largest chemical weapons production capacity in the Third World. It produces more than 1,000 tons of chemical agents every year, which is sufficient to sustain prolonged combat operations. Iraq first began developing chemical weapons in 1974 and since then, chemical weapons have become the backbone of Iraq's strategic weapons capability. *Iraqi Chemical Weapons Stockpiles Tough to Destroy*, United Press International, Sept. 10, 1990 (LEXIS, Nexis library, Intl file).

27. *Id.* *Pesh mergas* translates as "those who face death." U.S. NEWS & WORLD RE-

occurred in March 1988, at Halabja.²⁸ Iraqi warplanes dropped canisters of deadly gas on Halabja and on two nearby villages.²⁹ Within minutes, as many as 5,000 were dead and thousands more badly injured.³⁰ Ultimately, thousands of civilians died and many more were injured in what was presumed to be a reprisal against the people of an area long notorious as the center of Kurdish resistance.³¹

On August 20, 1988, a cease-fire took effect in the eight-year Iran-Iraq war.³² Since then, Iraq has turned its full fury on the Kurds.³³ Iraqi forces systematically attacked Kurdish villages with chemical weapons and artillery barrages.³⁴ The reason for the onslaught was vengeance — to punish the Kurds of northern Iraq who had dared to pursue their long struggle for autonomy during Saddam Hussein's war against Iran.³⁵ The Iraqis used mustard gas, nerve gas and cyanide gas to teach the Kurds a lesson and to create a Kurd-free buffer zone in battle-scarred northeastern Iraq.³⁶

Because of this intense offensive, over 60,000 Kurds fled across the northern border to Turkey and thousands of others fled to Iran.³⁷ Whole families were uprooted because the prime targets of the new Iraqi onslaught were civilians.³⁸

Iraq vehemently denies that it used chemical weapons against Kurdish rebels.³⁹ The U.S. State Department is certain that Iraq was using chemical weapons because the United States uncovered evidence supporting this belief.⁴⁰ Sources included the reports of eye-

PORT, Sept. 19, 1988, at 8.

28. U.S. NEWS & WORLD REPORT, April 4, 1988, at 11.

29. *Id.*

30. MacLeod, *The Cries of the Kurds*, TIME, Sept. 19, 1988, at 33.

31. A. HYMAN, *supra* note 13, at 15.

32. The Reuter Library Report, *supra* note 23.

33. *Id.*

34. *Id.*

35. Safire, *Stop the Iraqi Murder of the Kurds*, N.Y. Times, Sept. 5, 1988, at A21, col.

1.

36. Haberman, *For Turkey's Kurds, Fragile Gains*, N.Y. Times, Nov. 3, 1989, at A6, col. 1. Mustard gas burns, blisters and blackens the skin and can be lethal if inhaled. Nerve gas is 100 to 1000 times more potent. It causes convulsions and foaming and bleeding at the mouth before death. N.Y. Times, Sept. 9, 1989, at A1, col. 6.

37. Daily Telegraph (London), Nov. 18, 1988, at 16, col. 3.

38. U.S. NEWS & WORLD REPORT, Sept. 19, 1988, at 8. At least 2,200 civilians died in the August offensive compared to 250 Kurdish guerrillas. MacLeod, *supra* note 30, at 33.

39. The Reuter Library Report, Sept. 22, 1988 (LEXIS, Nexis library, Intl file). Iraq insists that it observes international conventions outlawing the use of chemical weapons. Iraqi Foreign Minister Tariq Aziz has stated that Iraq respects and adheres to all rules and regulations of international law and agreements, including the Geneva Protocol of 1925. The Reuter Library Report, Sept. 15, 1988 (LEXIS, Nexis library, Intl file).

40. N.Y. Times, Sept. 9, 1988, at A1, col. 6. Proving chemical weapon use is important. Applying international pressure to nations engaging in chemical warfare is vitally important. Such pressure cannot be applied unless the world community is convinced that nations accused of violating chemical weapons treaties are indeed using chemical weapons. Once a breach is demonstrated, international condemnation will mount and stop it. Note, *supra* note 9, at 269.

At present there are three mechanisms for investigating the facts underlying allegations of chemical weapons use: adversary investigations, UN General Assembly investigations, and Se-

witnesses to the attacks, Turks who saw the poisoned victims, reports from U.S. sources, fragments of shell and bomb casings contaminated by the chemicals they contained, and pictures of victims with skin and lung burns.⁴¹ Survivors' accusations have gained broad credibility in the West.⁴²

There have also been charges of genocide — "not just a whiff but the stench of genocide drifts from Kurdish areas of Iraq Those who commit such acts should know that the world watches, that sovereignty cannot legitimize genocide."⁴³ Amnesty International has charged that the mass killings are part of a deliberate policy to eliminate a large number of Kurds as punishment for their political sympathies and to retaliate for the activities of Kurdish opposition forces.⁴⁴ Jalal Talabani, the Kurdish leader of the Patriotic Union of Kurdistan (PUK), made similar accusations when he ventured out of Iraq in June, 1988 to bring the Kurdish story to the world.⁴⁵ Talabani stated that "[i]t's the first time in history a government has used chemical weapons against its own citizens who are not on the battlefield. Now the Iraqi Government daily is using chemical weapons. It's an Iraqi war of genocide against the Kurdish people."⁴⁶

Mr. Talabani also condemned the Hussein Government for the forced migration of thousands of Kurds to non-Kurdish areas and charged that Iraq destroyed one-thousand Kurdish villages.⁴⁷ A recent U.S. State Department human rights report described widespread destruction, the bulldozing of Kurdish villages, mass relocation of Kurds, and exile of Kurdish families into non-Kurdish parts of Iraq.⁴⁸ Many conclude that the Kurds are suffering from various forms of state oppression, including cultural oppression, economic oppression, political oppression, and physical oppression to the point

curity Council meetings. *Id.* A number of nations have called for an investigation of the charges against Iraq by the U.N., but none has been forthcoming. N.Y. Times, Sept. 13, 1988, at A1, col.3. For a discussion of the three mentioned mechanisms see Note, *supra* note 9, at 269-75.

41. N.Y. Times, Sept. 9, 1988, at A1, col. 6.

42. Haberman, *supra* note 36, at A6, col. 1.

43. *Murder Within Sovereign Borders*, *supra* note 19, at A20, col. 1. In a world that jealously guards the sovereignty of states, no international police can be summoned if a country slaughters within its own borders. There are no easy solutions to this problem of ethnic conflicts rooted in centuries of antagonism, and the Kurds are a particularly apt example. *Id.*

44. N.Y. Times, Sept. 8, 1988, at A16, col. 1.

45. Sciolino, *supra* note 10, at A3, col. 1. The PUK is one of the two main Kurdish separatist groups in Iraq. *Id.* The other group is the Kurdish Democratic Party (KDP), which is led by Masoud Barzani. MacLeod, *supra* note 30, at 33. Masoud Barzani is the son of the legendary leader, Mullah Mustafa Barzani, (1898-1979), who never achieved the goal of independence. However, his stubborn attempts to obtain it and his ability to inspire the Kurds to continue fighting made him a nationalist hero. A. HYMAN, *supra* note 13, at 6.

46. Sciolino, *supra* note 10, at A3, col. 2.

47. *Id.*

48. *Id.*

of genocide.⁴⁹

Despite the desperate plight of the Kurds, world reaction has been muted.⁵⁰ The United States Senate passed a bill calling for economic sanctions, but the Reagan Administration vehemently opposed congressional action aimed at imposing economic sanctions on Iraq.⁵¹ No major action was taken by the Reagan Administration for fear that it would help Iran's Islamic extremists defeat Iraq and dominate the oil-rich Persian Gulf. The Senate also accused Iraq of genocide and condemned its use of chemical weapons.⁵² The Reagan Administration stopped short of labeling Iraq's actions genocide because they did not want to antagonize that strong Middle Eastern country.⁵³ Finally, two years after the gassing of Halajaba, the Senate Foreign Relations Committee voted to impose trade sanctions against Iraq in protest of its use of chemical weapons and its general disregard for human rights.⁵⁴

America's allies proceeded even more cautiously. Great Britain was concerned with its appearance in the press.⁵⁵ The Thatcher Government believed that criticism of Iraq might appear to be an attempt to appease Iran in the hope of gaining the release of British hostages held by pro-Iranian groups.⁵⁶ France was concerned with money owed to it by Iraq.⁵⁷ Although French officials condemned the Iraqi use of chemical weapons, they remained mindful of the fact that Baghdad still owed Paris several billion dollars for weapons delivered during the Iran-Iraq war.⁵⁸ France, West Germany, Britain, and Italy were also competing for lucrative contracts to rebuild Iraq.⁵⁹ Vehement criticism might have jeopardized their bids.

Arab countries have rallied behind Iraq because they are wary of Iran's fundamentalist regime, and because they do not want to

49. A. HYMAN, *supra* note 13, at 22.

50. Smolowe, *supra* note 1, at 36. Nations that are not directly involved in the use of chemical weapons tend to ignore the allegations of usage because it is easier to do so. Also, human nature tends to disbelieve that nations are using weapons as horrible as chemical weapons. However, world opinion is all that is available to stop the use of such weapons. Note, *supra* note 9, at 285.

51. *Allies are Urging US Restraint on Libya*, Wall St. J., Jan. 6, 1989, at A8, col. 2.

52. U.S. NEWS & WORLD REPORT, Sept. 19, 1988, at 8.

53. N.Y. Times, Sept. 9, 1988, at A1, col. 6.

54. *Senate Panel Approves Iraq Trade Sanctions*, United Press International, June 28, 1990 (LEXIS, Nexis library, Intl file). The bill calls for cutting off credit guarantees that Iraq uses to buy U.S. farm products. Iraq is the largest importer of American rice. It also purchases cattle, eggs, corn, sugar, chicken, lumber, and tobacco from the U.S. The sanctions would remain in effect until the President certifies that Iraq is complying with international human rights conventions and the Geneva Protocol of 1925. *Id.*

55. Smolowe, *supra* note 1, at 36.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

undermine the fragile cease-fire.⁶⁰ The Arab states also do not want to antagonize the country with the strongest army in the Middle East.⁶¹ They fear a dangerous precedent would be set by allowing a U.N. investigation team to inspect a purely domestic problem.⁶²

Finally, in September 1988, ten nations invoked Security Council Resolution 620, calling for an inquiry into Iraqi conduct.⁶³ The resolution condemned Iraq for illegally using poison gas and requested that the Secretary General investigate the allegations.⁶⁴ Iraq rejected U.N. inspection as a challenge to its sovereignty.⁶⁵ Protest over Iraq's actions has not been sufficient enough to move the U.N. to vote for a human rights investigation.⁶⁶ One reason for the inaction is Third World solidarity; the developing countries do not want to criticize one of their own.⁶⁷ Another reason for the silence is the U.N.'s concern for the interests of its members, instead of for the lives of the Kurdish people or the proliferation of the use of poison gas.⁶⁸

Recently, the world had a chance to voice its objections to the Iraqi use of chemical weapons. In late 1988, President Reagan called for a world-wide conference to reaffirm commitments to the 1925 Geneva accord.⁶⁹ The conference was held in Paris, in January 1989.⁷⁰ One hundred forty-nine nations adopted the Final Declaration which reaffirmed the principle of no first-use of poison gas.⁷¹ The delegates failed, however, to censure Iraq for its routine use of chemical weapons, although this was one of the events precipitating the conference.⁷² The fact remains that Iraq has used chemical weapons for the past eight years with no serious objection, economic

60. *Id.*

61. *Id.*

62. *Id.*

63. N.Y. Times, Sept. 13, 1988, at A1, col. 3.

64. *Id.* at A1, col. 4.

65. Smolowe, *supra* note 1, at 36. Three additional countries lent support to the effort after the Reagan Administration leaked word that the U.S. had intercepted Iraqi communications confirming that lethal gas had been used. *Id.* Iraq invited journalists to investigate the Kurdish charges instead. Many considered this move to be a clever evasion - experts are trained to detect signs that a journalist might miss. *Id.*

66. *Tears for the Kurds*, N.Y. Times, April 10, 1989, at A16, col. 1.

67. Safire, *supra* note 35, at A21, col. 1.

68. *Id.*

69. Cody, *149 Nations Vow to Shun Poison Gas*, Washington Post, Jan. 12, 1989, at A1, col. 5.

70. *Id.*

71. *Conference of States Parties to the 1925 Geneva Protocol and Other Interested States On the Prohibition of Chemical Weapons: Final Declaration*, 28 I.L.M. 1020 (1989). Paragraph one expressed the intent to pursue disarmament, to eliminate chemical weapons and to support humanitarian assistance of victims of chemical weapons. Paragraph two called all states to accede to the Protocol. The third paragraph stressed the necessity of a convention banning chemical weapons. Paragraph four urged all states to use restraint in the interim. Finally, the fifth paragraph affirmed the role of the U.N. *Id.* at 1021. Iraq was a party to this declaration. *Id.* at 1020.

72. Cody, *supra* note 69, at A1, col. 5.

sanction, or threat of sanction from a non-involved nation.

Some progress has been made, however, on a new chemical weapons treaty. The negotiators at the Geneva Conference ended their latest round of talks in April, 1990 without an accord.⁷³ The major stumbling block was the necessity of concluding a bilateral agreement between the United States and the Soviet Union.⁷⁴ This obstacle was overcome on June 1, 1990, at the Washington Summit where Presidents Bush and Gorbachev signed a bilateral agreement on chemical arms control and disarmament.⁷⁵ Peruvian Ambassador Oswaldo de Rivero, who will chair the next Geneva session, stated that this momentous agreement "will certainly give fresh impetus to the Geneva Conference."⁷⁶ These events suggest that the Kurdish tragedy may have raised consciousness about the horrors of chemical weapons and may lead to action by the superpowers. As the superpowers lay down their chemical swords together, they are challenging all countries to do the same.

Over two years have now passed since the horrific Iraqi onslaught. The plight of the all-but-forgotten Kurds has remained unchanged.⁷⁷ As of November 1989, about 35,000 Iraqi Kurds still lived in tent cities and barracks-like apartment complexes in south-eastern Turkey.⁷⁸ They are forced to remain in a country that denies them basic human rights.⁷⁹ The Turks encouraged 14,000 Kurds to

73. *Chemical Arms Pact Hits Snag in Geneva*, Defense News, April 30, 1990 (LEXIS, Nexis library, Intl file).

74. *Id.*

75. *Laying Down the Chemical-Arms Sword*, Christian Sci. Monitor, June 20, 1990, at 18, col. 4. The main points of the agreement are as follows:

- * Destruction of at least fifty percent of stocks by 1999.
- * Stocks to be reduced to 5,000 agent tons by 2002.
- * Stopping the production of chemical weapons when this agreement enters into force, without waiting for the global chemical weapons ban.
- * On-site inspection during and after the destruction process to verify that demilitation has taken place.
- * Annual exchanges of data on declared stockpile levels to aid monitoring of the stockpiles.
- * Cooperation in developing and using environmentally safe methods of destruction.
- * Encouragement to chemical-weapons-capable nations to become parties to the multilateral convention.

Summit in Washington: Summary of U.S.-Soviet Agreement on Chemical Arms, N.Y. Times, June 2, 1990, at 8, col. 2.

76. Regin, *U.S.-Soviet Accord Gives Impetus to Chemical Weapons Talks*, Reuter Library Report, June 12, 1990 (LEXIS, Nexis library, Intl file). Reaching a comprehensive ban on chemical weapons is a daunting task. There are many reasons for the slow pace of negotiations. A global ban is extremely complicated. It would affect a crucial world industry whose component parts have other legitimate uses. The intrusive inspection procedures that would be required raise concerns among chemical producers. Finally, nations such as Iraq and Libya would have no qualms about violating the ban. Flowerree, *Banish the Shadow of Chemical Warfare*, Newsday, April 20, 1990, at 85, col. 1.

77. *Tears for the Kurds*, *supra* note 66, at A16, col. 1.

78. Haberman, *supra* note 36, at A6, col. 1.

79. *Id.* It is in Turkey, the country with the largest Kurdish population, that many

move to Iran, another country that slaughters its Kurds.⁸⁰ The living conditions in these camps are dismal; the quarters are cramped, the occupants have nothing to do, the after-effects of poison gas and poor nutrition combine to cause illness and death.⁸¹ The Kurds are treated like prisoners because the Turks believe the Iraqi Kurds may present a security problem.⁸² The Iraqi Kurds remain the stateless people about whom the world has forgotten. The United States and other western governments did nothing to stop Saddam Hussein until he threatened their vital interests in the region.⁸³

III. Iraqi Use of Chemical Weapons as a Violation of International Law

Article 38(1) of the Statute of the International Court of Justice provides that the court shall apply international conventions, international custom, general principles of law, judicial decisions, and the teachings of highly qualified publicists when resolving disputes.⁸⁴ These five categories are traditionally classified as the sources and evidences of international law.⁸⁵ In determining whether the Iraqi use of poison gas against the Kurds violated international law, the three most important sources must be examined to determine whether they prohibit the use of chemical weapons in the Kurdish situation. The Kurdish tragedy will serve to illustrate the strengths and weaknesses of the current regulatory regime.

Kurds feel they have been most suppressed over the years. For more than six decades, Turkey has not accepted the Kurds as a legitimate minority. Kurds are officially known as "mountain Turks." *Id.*

While Iraqi Kurds wear traditional Kurdish dress, Turkish Kurds wear Western dress. Iraqi Kurds maintain the emblems of an identity. Conversely, Turkey's Kurds have homes and land, but their identity is under constant challenge. Turkey's Kurds have been involved in an insurgency since 1984. *N.Y. Times*, Sept. 7, 1988, at A1, col. 4.

80. Haberman, *supra* note 36, at A6, col. 1. The Ayatollah Khomeini executed as many 15,000 Kurds and sent 200,000 troops to occupy the province of Kurdistan. *Tears for the Kurds*, *supra* note 66, at A16, col. 1.

81. *N.Y. Times*, March 31, 1989, at A4, col. 3; *N.Y. Times*, Sept. 22, 1988, at A21, col. 1.

82. *N.Y. Times*, Sept. 22, 1988, at A21, col. 1. Turkey is battling its own Kurdish guerrillas, who fight for autonomy under the banner of the Kurdish Workers Party. Since 1984, 1,100 have been killed in skirmishes with the Turkish army. *Id.*

83. Aram, *Belated Reaction to Kurds' Plight*, *Independent* (London), Sept. 10, 1990, at 18, col. 3.

84. Statute of the International Court of Justice, art. 38, *reprinted* in S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 815 (1965). The International Court of Justice is the ultimate judicial authority in matters of international law. The court exists in conjunction with the United Nations as the successor to the League of Nations' Permanent Court of International Justice. Under Article 93(1) of the United Nations Charter, all members are parties to the court's governing principles (Statute) and enjoy full access to the court. *Id.* at 271.

85. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS*, 289 (3d ed. 1986). These sources are listed in order of importance. *Id.*

A. *International Conventions*

There are only two treaties now in force that specifically prohibit certain aspects of chemical warfare; the Hague Declaration IV of 1899 and the Geneva Protocol of 1925. Because the Geneva Protocol of 1925 (with 115 signatories) is the most influential, it will be analyzed first.

The Geneva Protocol of 1925 provides in relevant part:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilised world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

DECLARE:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration⁸⁶

The Geneva Protocol must be analyzed to determine if the Iraqi use of chemical weapons against the Kurds violated International Law.⁸⁷ When Iraq utilized chemical weapons in 1988, many newspaper and magazine articles stated that the Iraqis had violated the Geneva Protocol of 1925.⁸⁸ At first glance, such statements appear correct. Such is not the case.⁸⁹ A careful reading of the Geneva Protocol reveals that there are problems regarding its applicability to the Kurdish situation.

86. Geneva Protocol of 1925, *supra* note 14.

87. See THOMAS & THOMAS, *supra* note 18, at 73. Even if it were determined that the Iraqis did violate the Geneva Protocol of 1925, the Protocol does not specify sanctions. It merely states that the parties to the agreement will use their best efforts to make other nations comply. Geneva Protocol of 1925, *supra* note 13. Lack of sanctions is not an unusual feature in international conventions because viable options for international sanctions are limited. Note, *supra* note 9, at 266.

88. Smolowe, *The Search for a Poison Antidote*, TIME, Jan. 16, 1989, at 22; N.Y. Times, Sept. 13, 1988, at A1, col. 3; N.Y. Times, Sept. 9, 1988, at A1, col. 6.

89. Resolving treaty interpretation disputes is critical; when international obligations are unclear or ambiguous, a nation can contend that it did not violate the treaty by its use of chemical warfare. Note, *supra* note 9, at 292. If treaty terms were clarified, countries could be certain when a breach occurred. This could result in increased political pressure on the breaching country. *Id.*

Disputes over interpretation could be settled more easily if the parties amended the chemical weapons agreements to require compulsory submission of such disputes to the International Court of Justice. *Id.* at 293. Adopting such an amendment would show that nations are serious about enforcement. *Id.* at 294.

Treaty interpretation is analogous to statutory interpretation and often includes an analysis of specific terms to determine if parties breached the treaty.⁹⁰ The Geneva Protocol contains three requirements: (1) it applies only to parties to the Protocol, (2) in situations that constitute a war, and (3) that involve the use of prohibited agents. Interpretive problems exist regarding each requirement. One problem is that the preamble of the Protocol makes reference only to the "use in war" of chemical weapons; the operative portion of the Protocol thus refers only to warfare.⁹¹ War is used in its material sense, rather than in its formal sense (i.e. declared war).⁹² International war occurs when a government no longer permits its relations with another government to be guided by the laws of peace.⁹³ "War" is international war — war between states.⁹⁴ The understanding throughout the four Geneva Conventions of 1949 that deal with the conduct of warfare is that these conventions apply to war between states, and unless expressly provided, not to civil war or insurgency.⁹⁵

Because the Geneva Protocol does not apply, by its own terms, to civil wars or domestic disturbances, it does not apply to the Iraqis' use of poison gas against the Kurds. The Kurds are a distinct ethnic group, but they do not constitute a state. They are Iraqi citizens who are fighting for political autonomy; therefore, the Geneva Protocol cannot be applied to this situation.

There is a second problem with the applicability of the Geneva Protocol. Iraq's reservation to the Protocol provides as follows:

90. Note, *International Regulation of Chemical and Biological Weapons: "Yellow Rain" and Arms Control*, 1984 U. ILL. L. REV. 1029. The multilateral Vienna Convention of the Law of Treaties supplements the International Court of Justice Statute by delineating guidelines for treaty interpretation.

One of the most important provisions is Article 18 which dictates that a "[s]tate is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty." Also important is Article 38 which states that a treaty may become binding upon a nonparty as a customary rule of international law. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 38; *reprinted in* T. ELIAS, *THE MODERN LAW OF TREATIES* (1974); Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 129/15 (1986) [hereinafter Vienna Convention].

Although Iraq is not a party to the Vienna Convention, the Convention may still be binding. The Convention purportedly reflects customary international law and; therefore, binds Iraq. Note, *supra* note 90, at 1038.

91. Geneva Protocol of 1925, *supra* note 14.

92. Baxter & Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT'L L. 853, 868 (1970).

93. *Id.*

94. *Id.*

95. *Id.* at 869. The consensus appears to be that purely civil wars are not covered by the phrase "use in war." Note, *supra* note 9, at 291. Some suggest that the Protocol itself is not applicable to armed conflicts not having an international character, but it is not clear what constitutes a conflict with an international character. Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon* 33 AM. U. L. REV. 145 (1983). The Iraqi situation might be considered an armed conflict of international character because the Kurds did receive assistance from the Iranians. However, it is not clear whether that is enough or if participation of military units is necessary. *Id.*

The Iraqi Government shall be bound by the provisions of the protocol only with respect to the States which have both signed and ratified it or which have acceded to it, and shall not be bound by the protocol with respect to any enemy State whose armed forces or whose allies fail to respect the provisions of the protocol.⁹⁶

This reservation requires mutuality of obligation. Iraq is bound to refrain from the use of chemical weapons against only those states that have ratified the Protocol. This means that a state party to the Protocol may employ chemical weapons against any non-party state.⁹⁷ The Iraqi use of chemical weapons against the Kurds does not violate the Geneva Protocol because of this reservation. The Kurds are not a political entity, and thus have not become a party to the Protocol.

Other criticisms of the Protocol exist. The Geneva Protocol only prohibits the use of chemical weapons. It does not prohibit their production or stockpiling. This is because the Protocol governs the humanitarian conduct of war; it is not an arms control agreement. Another deficiency of the Protocol is its lack of provisions for verifying compliance, investigating noncompliance, or enforcing the prohibitions. Finally, the Protocol does not define terms such as "war," "asphyxiating," or "other gases." These deficiencies are, unfortunately, painfully obvious in the Kurdish situation.

A second treaty that prohibits certain aspects of chemical warfare is the Hague Declaration IV of 1899. The sixteen signatories adopted a declaration which stated that the parties should not, in war between two or more signatories, use projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.⁹⁸ Iraq is not a signatory of the Hague Declaration. Furthermore, the Declaration was not signed by a sufficient number of states to give it applicability as a matter of international law.⁹⁹

Because there are only two conventions dealing specifically with chemical weapons and because these are not applicable to the Kurdish situation, we must now examine prohibitions in other conventions on the use of weapons in general. Despite an element of paradox, the law has produced certain customs of warfare: military necessity, humanity and chivalry.¹⁰⁰ This customary law of war on land was codified in the Hague Convention Concerning the Laws and Customs of War on Land of 1907 (Hague IV).¹⁰¹ Article 23(a) appears espe-

96. *U.S. Ratification of the 1925 Geneva Protocol*, *supra* note 15, at 49.

97. Baxter & Buergenthal, *supra* note 92, at 870.

98. 2 L. OPPENHEIM, *INTERNATIONAL LAW* 342 (H. Lauterpacht, 7th ed. 1952).

99. O. FENWICK, *INTERNATIONAL LAW* 557 (3d ed. 1948).

100. I. BROWNIE, *CHEMICAL AND BIOLOGICAL WARFARE* 141 (S. Rose ed. 1986).

101. *Hague Convention Concerning the Laws and Customs of War on Land of 1907*

cially relevant because it forbids the employment of poison or poisoned weapons; practice has revealed a restrictive interpretation of that term.¹⁰² States have not applied Article 23's prohibition to the use of poison gas because Hague IV was formulated at a time when the experience of mankind did not encompass poison in terms of chemical weapons.¹⁰³

Article 23(e) of Hague IV, pertaining to unnecessary suffering, codifies the principle of humanity. One of the most frequent objections raised against chemical warfare is that it is inhumane.¹⁰⁴ The paramount question is not whether poison gas causes suffering, but whether it causes "unnecessary suffering." The use of poison gas in some situations is as acceptable as the use of conventional weapons,¹⁰⁵ but the Iraqi's use of mustard gas and the especially noxious nerve gas against the Kurds caused the Kurds "unnecessary" suffering.¹⁰⁶

Because the Kurds had no protective clothing, the gases came into direct contact with their skin and lungs. Exposure to mustard gas results in "systematic poisoning with malaise, nausea, vomiting, fever, cardiac irregularities, and death within twenty-four hours to two weeks."¹⁰⁷ The symptoms of exposure to nerve gases, in order of appearance, are: "running nose; tightness of chest; dimness of vision and pinpointing of the eye pupils; difficulty in breathing; drooling and excessive sweating; nausea; vomiting, cramps, and involuntary defecation and urination; twitching; jerking and staggering; headache; confusion; drowsiness; coma and convulsion . . . followed by cessation of breathing and death."¹⁰⁸ The survivors of the Halabja gassing watched their skin blister and fall away, or gasped helplessly

(Hague IV) 36 Stat 2277, T.S. No. 539. Hague IV provides in part that it is forbidden:

(a) To employ poison or poisoned weapons:

(b) To kill or wound treacherously individuals belonging to the hostile nation or army; . . .

(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering . . .

Id.

102. Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 44 (1960).

103. *Id.*

104. After the First World War, some writers argued that chemical weapons were more humane because they produced a lower ratio of fatalities to casualties and of permanently disabled people to total casualties. R. CLARKE, *THE SILENT WEAPONS* 204 (1968). Whatever validity that assertion once had, it is no longer true today because more lethal nerve gas has been developed that results in a very high ratio of fatalities to casualties. *Id.* at 205.

The widespread revulsion to the use of chemical weapons seems to be intuitive; few have articulated the reasons for viewing chemical weapons differently than other weapons. Some suggested reasons for treating chemical weapons differently are: they often cause protracted suffering, they are uniquely anti-civilian, they may open up a whole new sphere of weapons research, and they may alter the balance of nature. Note, *supra* note 9, at 261.

105. Kelly, *supra* note 102, at 48; see also THOMAS & THOMAS, *supra* note 18, at 66.

106. See Smolowe, *supra* note 7, at 46.

107. THOMAS & THOMAS, *supra* note 18, at 7.

108. *Id.* at 5.

from internal injuries.¹⁰⁹ Considering the preceding description of the death caused by poison gas, "unnecessary" suffering most certainly occurred when the Iraqis brutally punished the Kurdish minority for its twenty year guerilla war.

The last provision in Hague IV of some relevance to the topic of chemical weapons is article 23(b) dealing with treachery in warfare. The prohibition against treachery can be equated with the principle of chivalry in warfare.¹¹⁰ Poison gas generally cannot be considered a treacherous weapon.¹¹¹ Treachery refers instead to deceit and violations of confidence rather than surprise.¹¹² The meaning of treachery depends on its use in a particular situation; in the Kurdish situation, it does not appear, from the indirect evidence, that the Iraqis were deceitful.

The Iraqis apparently violated Hague IV since they caused "unnecessary" suffering. However, Hague IV applies only to war, as its title, Convention Concerning the Laws and Customs of War on Land (emphasis added), suggests. The convention is not applicable to internal conflicts. But for this fact, the Iraqis would have violated the Convention. As previously mentioned, the customary rules of law are not displaced by their codification and the prohibitions of treaties are not necessarily coextensive with corresponding prohibitions in customary international law.¹¹³ Since it is generally accepted that general principles of the humanitarian law of war apply to internal conflicts, the unnecessary suffering principle of customary law should apply to the Kurdish tragedy.¹¹⁴

The Hague Conventions on the law of war deal with rules for the conduct of hostilities. Another, separate aspect of the law of war has been developed: the humanitarian law applicable to armed conflict.¹¹⁵ These principles have been codified in the Geneva laws.¹¹⁶ The conventions comprising the Geneva laws are directed toward rules of a distinctly humanitarian nature, those concerning the protection of the human being or of the essential aspects of humanity. It was recognized that non-international wars have been frequent and deadly, so article 3, which is identical in all four of the Geneva Conventions, contains basic rules applicable to these conflicts. Article 3 provides, in pertinent part, as follows:

109. U.S. NEWS & WORLD REPORT, April 4, 1988, at 11.

110. I. BROWNIE, *supra* note 100, at 141.

111. Kelly, *supra* note 102, at 48.

112. *Id.*

113. Baxter & Buergenthal, *supra* note 92, at 856.

114. I. BROWNIE, *supra* note 100, at 142.

115. INTERNATIONAL COMMITTEE OF THE RED CROSS, REAFFIRMATION AND DEVELOPMENT OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICTS 6 (21st International Conference of the Red Cross, 1969) [hereinafter ICRC REAFFIRMATION].

116. *Id.*

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria . . .¹¹⁷

The Kurdish insurgency is clearly "an armed conflict not of an international character." In applying article 3 to the Iraqis use of chemical weapons against the Kurds, three aspects of the conflict fall within the meaning of the provision. First, most of the casualties were civilians who were taking no active part in the hostilities. While some critics restrict the application of article 3 to those who are already victims of an armed conflict, such as prisoners and the sick or wounded,¹¹⁸ literal interpretation of the clause seems to suggest that applicability includes, but is not limited to, the sick and the wounded.

Second, gassing civilians, killing and seriously wounding thousands, and causing over 60,000 to flee the country can hardly be characterized as humane treatment. Finally, the Kurds were afforded such inhumane treatment because they are a distinctive ethnic group that has never been assimilated into mainstream Arab society. The logical conclusion is that the Iraqis violated the Geneva Conventions.

In the late 1960's, the international community believed that humanitarian laws and customs needed to be developed and reaffirmed, especially in the area of internal conflicts.¹¹⁹ The ensuing effort resulted in two protocols. These two protocols updated the Geneva Conventions and Hague IV, and introduced new rules into the law of war. The one most applicable to the Kurdish situation is The Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International

117. Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Treatment of Prisoners of War 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Protection of Civilian Persons in the Time of War 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

118. Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Convention of 1949 and Other Human Rights Instruments*, 33 AM. U. L. REV. 14 (1983).

119. ICRC REAFFIRMATION, *supra* note 115, at 8.

Armed Conflicts (Protocol II) adopted by the Conference on 6 June 1977.¹²⁰ These protocols represent a tremendous advance in humanitarian law, particularly in their concern for the protection of civilians.¹²¹ Although Iraq is not a party to Protocol II, the convention is evidence of the existing state of international law and so the principles enshrined in Protocol II may be binding upon Iraq.¹²²

Article 1 of Protocol II deals with its material field of application and provides, in relevant part:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces . . . which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations . . .¹²³

The Kurds have been fighting for centuries for independence.¹²⁴ Saddam Hussein has been the target of this rebellion since 1974.¹²⁵ At one point, the Kurds controlled much of Iraqi Kurdistan with the support they received from the Shah of Iran.¹²⁶

The requirements for the applicability of Protocol are satisfied. The Protocol, therefore, applies to the gassing of the Kurds because the Kurds had been fighting against the Iraqi government. Article 4 provides for the humane treatment of "all persons who do not take a direct part or who have ceased to take part in hostilities . . .," which includes respect for their person, honor and convictions.¹²⁷ Violence to life, health and physical or mental well-being, such as murder, is

120. Protocols Additional to the Geneva Conventions of 1949, *opened for signature* Dec. 12, 1977, reprinted in 16 I.L.M. 1391, 1442 (1977) [hereinafter Protocols I & II].

121. See ICRC REAFFIRMATION, *supra* note 115, at 9.

122. I. BROWNIE, *supra* note 100, at 142. An example of Protocols I & II that provides evidence of the existing state of international law is found in the comments made in a study of the armed conflict in Bolivia. Both sides were called upon to abide by the provisions of international humanitarian law, *inter alia*, the Geneva Conventions and Protocols I & II, even though Bolivia was not a party at that time — "It is nevertheless essential to bear in mind that such obligations exist as a direct consequence of the Charter of the U.N. and The Universal Declaration of Human Rights." Ramcharan, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights in Non-International Armed Conflicts*, 33 AM. U. L. REV. 99 (1983).

123. Protocol II, *supra* note 122, at 1443. The original intent of the ICRC was to give broad scope to the Protocol. It desired a low threshold of violence to trigger the Protocol. Disappointment was apparent when the "necessity to control territory" requirement was added. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict*, 72 AM. J. INT'L L. 284 (1978).

124. Barnes, *supra* note 13, at 55.

125. A. HYMAN, *supra* note 13, at 7.

126. *Id.*

127. Protocol II, *supra* note 122, at 1444.

prohibited.¹²⁸ The Iraqi gassing of the Kurds violated article 4 of Protocol II because of the great violence to civilian life that resulted from the attacks. Thousands of civilians were killed, and many more were badly injured.¹²⁹ Arguably, almost any use of chemical weapons against civilians would violate Protocol II. The Kurdish tragedy was unquestionably a violation of the humanitarian laws of war as codified in Protocol II.

A third type of international law relevant to the Kurdish situation are conventions codifying general international human rights laws. The United Nations Charter was the first international document that endowed individual human beings with fundamental human rights and freedoms.¹³⁰ The Charter is a legal document; its language is that of international law.¹³¹ There is no doubt that the provisions of the Charter impose upon member states the legal duty to obey them; a member guilty of a violation of these provisions breaches the Charter itself.¹³²

The U.N. Charter heralded a new international law of human rights. Gone was the dogmatic belief that a government's behavior toward its own nationals was a matter of domestic, not international, concern.¹³³ Beginning with the preamble, the Charter reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women . . ."¹³⁴ Article 1 of the Charter provides that one of the purposes of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . ."¹³⁵ A mandatory obligation is implied in article 55(c) of the Charter to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction . . ."¹³⁶ Finally, article 56 of the Charter, in which members pledge to take action to achieve the purposes of article 55, imposes a distinct legal duty to respect and follow all of the

128. *Id.*

129. Smolowe, *supra* note 7, at 46.

130. H. LAUTERPACHT, INTERNATIONAL AND HUMAN RIGHTS 33 (1968).

131. *Id.* at 34. The Charter repeatedly affirms the fundamental human rights of the individual, which must be deemed to refer to legal rights - to legal rights recognized by international law and independent of the law of the State. *Id.*

132. *Id.* There may be no international tribunal that has compulsory jurisdiction to discover the facts of a violation of the Charter, but international tribunals have no compulsory jurisdiction in the matter of the fulfillment of international duties. *Id.* If the Charter forms part of the municipal law of the member state, it is enforceable as such. *Id.* at 35.

133. THE INTERNATIONAL BILL OF RIGHTS 6 (L.Henkin ed. 1981)[hereinafter INTERNATIONAL BILL]. The Charter penetrated national frontiers and the veil of sovereignty. Its true purpose was to improve the lot of individual men and women. *Id.*

134. U.N. CHARTER preamble.

135. U.N. CHARTER art. 1, para. 3.

136. H. LAUTERPACHT, *supra* note 132, at 148.

mandates of the Charter.¹³⁷

The pledge of action in article 56, and all other articles previously described, are violated when a member state persists in committing gross violations of human rights universally recognized as fundamental. There are no rights more fundamental than the rights to life, to physical integrity, and to liberty.¹³⁸ These rights were violated when the Iraqis dropped chemical weapons on the unprotected and unsuspecting Kurds.¹³⁹ Any use of chemical weapons against civilians would violate the U.N. Charter.

The last human rights convention to be analyzed is the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Article II of the Genocide Convention provides as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁴⁰

Other claims of genocide by Iraq had been made to the U.N. prior to the 1988 gassing catastrophe, but no formal decision has been reached due to political pressures and lack of opportunity for enforcement.¹⁴¹ The crimes the Iraqis committed this time were much worse. They killed thousands of Kurds with the intent to destroy the minority group that had been plaguing them for the past seventy years.¹⁴² From the foregoing analyses, it is clear that the

137. *Id.*

138. INTERNATIONAL BILL, *supra* note 135, at 114.

139. Human rights organizations declared that the mass killings from the army assault and from chemical weapons use "represent a most serious denial of the purposes of the United Nations Charter and a flagrant contravention of fundamental international human rights norms." The Reuters Library Report, Sept. 8, 1988 (LEXIS, Nexis library, Intl file).

140. Convention on the Prevention and Punishment of the Crime of Genocide of 9 Dec. 1948, 78 U.N.T.S. 277 (1948) [hereinafter Genocide Convention]. The U.S. had not ratified the Genocide Convention as of 1988. *Id.*

141. J. PORTER, GENOCIDE AND HUMAN RIGHTS 6 (1982).

142. The European Parliament passed a motion accusing Iraq of trying to wipe out the Kurds with chemical weapons. The Reuters Library Report, *supra* note 23. In addition, the Iraqi acts were characterized as a "campaign of extermination" aimed at an ancient ethnic group that strives to keep its own language and customs. Safire, *supra* note 35, at A21, col. 1.

Iraqis have violated international human rights laws.

B. Customary Law

Custom has been referred to as "the oldest and the original source of international law."¹⁴³ International custom as a law creating procedure must meet two conditions: 1) practice among states; and 2) the conviction that the practice is applied because it is legally binding.¹⁴⁴

The most important customary laws of war, as discussed above, address unnecessary suffering, noncombatants, and chemical weapons. It is an incontestable principle of customary law that the use of weapons calculated to cause unnecessary suffering is forbidden.¹⁴⁵ The Iraqis' use of chemical weapons against the Kurds caused unnecessary suffering because the death associated with poison gas is violent and causes serious injury. That the conflict between the Iraqis and the Kurds is not "war" or an international conflict is inconsequential; the modern interpretation of international law applies the law of land warfare to insurgencies.¹⁴⁶

Another international custom distinguishes between the use of weapons against combatants and noncombatants during an armed conflict.¹⁴⁷ The indiscriminate nature of poison gas makes its use likely to violate this custom. The Iraqis made no attempt to differentiate between civilians and combatants; on the contrary, civilians were their primary target.¹⁴⁸

A split of authority exists with respect to whether there is a customary rule of law prohibiting the use of chemical weapons.¹⁴⁹ The disagreement continues today. As recently as ten years ago, the use of chemical weapons was taboo, but that taboo has now been

143. L. OPPENHEIM, *supra* note 98, at 25-26. Custom is defined as the conduct, or the conscious abstention from certain conduct, of members of a society that becomes a part of the legal order of that society. H. STEINER & D. VAGTS, *supra* note 85, at 209.

144. THOMAS & THOMAS, *supra* note 18, at 135.

145. I. BROWNLIE, *supra* note 100, at 147.

146. *Id.*

147. Kelly, *supra* note 102, at 48.

148. See U.S. NEWS & WORLD REPORT, Sept. 19, 1988, at 8.

149. The writers Kelly and Thomas make strong arguments as to why such a custom did not exist at the time they were writing. The reservations made to the Geneva Protocol of 1925 indicate that no custom was recognized at that time. THOMAS & THOMAS, *supra* note 18, at 78. No poison gas was used in combat during the Second World War because of the Geneva Protocol. "It would be difficult to argue that the practice of states resulting from a convention they signed has independently created a custom that binds other states who have deliberately refrained from adhering to the convention. Kelly, *supra* note 102, at 50.

Oppenheim and Brownlie believe that the peace treaties of the First World War, the Washington Treaty of 1922 and the Geneva Protocol of 1925, are evidence that chemical warfare is prohibited by customary international law. I. BROWNLIE, *supra* note 100, at 143. For a survey of commentators, see Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 WIS. L. REV. 375, 386 n.57.

weakened, if not destroyed.¹⁵⁰ Evidence of this is shown by the number of countries that have used chemical weapons in the past two decades which include Iraq, Iran, Afghanistan (the Soviets and the Afghan military), Vietnam, Cuba, Libya and The Sudan.¹⁵¹ The moral prohibition that has held the horrors of chemical weapons in check for the past seventy years has crumbled, in part because the world has been silent. Iraq's flagrant violation of human rights and the customary laws of war did not inspire an outcry from other countries. This silence gave other governments the impression that they could also use chemical weapons without risking international censure. World opinion will not weigh too heavily in a country's decision to use chemical weapons. Telling evidence of the crumbling prohibition is provided by Iraq's threats to use chemical weapons in the current Persian Gulf crisis.

At least twenty countries now have chemical weapons or have the present capability to make them.¹⁵² Proliferation has been greatest in the Third World because chemical weapons are cheap and simple to produce.¹⁵³ They are known as the poor man's atom bomb.¹⁵⁴ Terrorists and drug runners may take advantage of the absence of world outrage and of the proliferation of chemical weapons, and may utilize chemical weapons. The Director of U.S. Arms Control and Disarmament Agency has stated that "there is a general consensus that use of chemical weapons is wrong. I think we want to re-establish that."¹⁵⁵ From the foregoing evidence, it appears that whatever custom there might have been banning chemical weapons no longer exists in certain circles. Practice of states has demonstrated that chemical weapons may be used without retaliation.

C. General Principles of Law

A third source of international law is derived from those principles of law that are generally recognized by civilized countries.¹⁵⁶ One of the general principles of international law applicable to chemical weapons is proportionality — the ends to be gained must

150. Smolowe, *supra* note 7, at 47.

151. HARRISON & ROBERTS, *supra* note 3, at 87-89. Many of the countries mentioned have used chemical weapons numerous times against a number of different victims. For a description of these allegations *see id.*

152. Smolowe, *supra* note 7, at 47.

153. *Id.*

154. The Reuter Library Report, Sept. 25, 1989 (LEXIS, Nexis library, Intl file).

155. Smolowe, *The Search for a Poison Antidote*, TIME, Jan. 16, 1989, at 22.

156. THOMAS & THOMAS, *supra* note 18, at 187. "General principles of law" refers to the principles of "general significance in the legal systems of all or most civilized or developed countries." H. STEINER & D. VAGTS, *supra* note 85, at 321. International law shares a substructure of basic propositions based on equitable or natural law principles with a country's municipal law. Kelly, *supra* note 102, at 51.

be proportional to the means used to attain them.¹⁵⁷

The Iraqis' goals were to punish the Kurds for their rebellion and to end the rebellion. Killing thousands of civilians and seriously wounding many more was excessive in proportion to the end of putting down the rebellion. The unnecessary suffering and death of innocents can hardly be justified by the Iraqis with the excuse that they were suppressing a rebellion. The Iraqis violated the general principle of proportionality. This principle could be applicable to other instances of chemical warfare depending upon the factual situation.

Another important principle is the de Martens clause.¹⁵⁸ This clause stands for the "dictates of the public conscience," and appears in the Hague and Geneva Conventions.¹⁵⁹ The public conscience is difficult to determine and, under modern methods of propaganda, it is possible for public conscience to be channeled into the changing currents of public opinion.¹⁶⁰ It is, therefore, unreliable to legally bind states to a pattern of conduct for the future.¹⁶¹ Whether the Iraqis have violated the de Martens clause is questionable because of the difficulty in determining what constitutes the "public conscience."

Other important principles of international human rights law are contained in the Universal Declaration of Human Rights (Declaration).¹⁶² The Declaration was adopted by the U.N. General Assembly in 1948 and has been accepted by almost all countries.¹⁶³ Quite a number of provisions in the Declaration apply to the Kurdish situation, but only the most important will be analyzed. The preamble of the Declaration mentions the promotion of universal respect for and observance of human rights and fundamental freedoms. Article 2 of the Declaration is a non-discrimination clause, which is applicable because the Kurds were singled out due to their race. Especially important is article 3 of the Declaration, which provides that "Everyone has the right to life, liberty and the security of person."¹⁶⁴ The right to life was violated when the Iraqis murdered thousands of innocent people. Finally, article 13 of the Declaration gives everyone the "right to freedom of movement and residence within the borders of each state."¹⁶⁵ The Iraqi gas onslaught caused

157. Kelly, *supra* note 102, at 51.

158. *Id.* at 61.

159. *Id.*

160. THOMAS & THOMAS, *supra* note 18, at 191.

161. Kelly, *supra* note 102, at 62.

162. Universal Declaration of Human Rights, G.A. Res 217 A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Declaration].

163. INTERNATIONAL BILL, *supra* note 135, at 1.

164. Declaration, *supra* note 164.

165. *Id.*

at least 60,000 Kurds to flee the country and live in camps in Turkey and Iran.¹⁶⁶

V. Suggestions for Change to Prevent a Repetition of the Kurdish Massacres

Treaties addressing chemical weapons have been unsuccessful because of their lack of effective verification and compliance provisions.¹⁶⁷ There is no force in international law to back them up. The complacency of the international community has contributed to the proliferation of chemical weapons and to their use. Applying international pressure to nations engaging in chemical warfare is vitally important. The silence and lack of effective punishment have shown countries that they can use chemical weapons without fear of retribution. It is time for a new convention on chemical weapons.

The forty-nation Conference on Disarmament in Geneva has, since 1984, been debating the U.S. proposal to ban possession and production of chemical weapons.¹⁶⁸ The proposed draft treaty calls for a comprehensive, effectively verifiable ban calling for mandatory on-site inspections by an international body within forty-eight hours of the alleged use of chemical weapons.¹⁶⁹ The inspection provision encompasses previously identified and declared production facilities, as well as suspected production by private chemical industries.¹⁷⁰

A global ban is complicated and will not work unless there are no nonsignatories who possess chemical weapons. A total ban will be difficult to achieve because chemical weapons appeal to the Third World.¹⁷¹ Chemical weapons are cheap and easy to use.¹⁷² The U.S. has stated that it will consider economic sanctions against nations that refuse to go along with a total-ban treaty because such bans do not work unless all nations comply.¹⁷³

Another problem with a total ban is verification. Only the presence of extraordinary security distinguishes a chemical weapons plant from a pesticide factory or a pharmaceutical plant.¹⁷⁴ Unannounced inspections, provided for in the convention, are necessary because a chemical weapons plant can easily be converted into a le-

166. Haberman, *supra* note 36, at A6, col. 1.

167. HARRISON & ROBERTS, *supra* note 3, at 16.

168. Smolowe, *supra* note 7, at 47.

169. HARRISON & ROBERTS, *supra* note 3, at 35.

170. *Id.*

171. Third World countries do not want a repeat of the nuclear non-proliferation treaty that banned the spread of nuclear weapons but allowed developed countries to keep theirs. The Reuters Library Report, Sept. 25, 1989 (LEXIS, Nexis library, Intl file).

172. Hydrochloric acid and thiodiglycol—a solvent used in ink—are all that is necessary to make mustard gas, one of the gases the Iraqis used against the Kurds. *Id.*

173. N.Y. Times, Sept. 26, 1989, at A1, col. 6.

174. Galloway, *Bad Chemical Reaction*, U.S. NEWS & WORLD REPORT, Jan. 16, 1989, at 30.

gitimate private factory. A permanent organization to investigate charges of chemical weapons production and use is also needed. The delays inherent in investigating chemical warfare allegations would be minimized by using a permanent organization, because its members would be experienced in working together and in collecting samples efficiently.¹⁷⁵ Investigating and punishing treaty violations is most crucial when a nation, such as Iraq, is engaged in a continuing pattern of chemical warfare. If that nation is not stopped, other nations will feel compelled to produce and possibly to use chemical weapons for their own defense.¹⁷⁶

In the interim, the law should be strengthened to provide for the supervision of chemical weapon use. Sanctions must be imposed upon countries that use chemical weapons; these sanctions must be imposed by a large number of countries or they will not be effective.¹⁷⁷ Nations must voice their opposition to the use of chemical weapons and must back up their words with actions.

The ban on the export of technology and of the chemicals necessary to make poison gas must be enforced and more effective measures must be promulgated. Representatives of nineteen countries have struggled to implement new export regulations to curb the trade of chemicals.¹⁷⁸ In 1985, a Chemical Warning List was created by the U.S. and several other countries to help countries identify and avoid transactions which might enable countries to produce chemical weapons.¹⁷⁹ Success has been limited.¹⁸⁰ Some progress has been made in stopping proliferation, but much remains to be done.

175. Note, *supra* note 9, at 280. One way to establish an organization for investigation would be to expand the activities of an existing international organization, such as the Red Cross, the United Nations High Commissioner for Refugees, or the World Health Organization. *Id.* These organizations have access to parts of the world that others cannot enter. Unfortunately, all three organizations have refused to help. *Id.* at 281.

176. That is exactly what occurred during the Iran-Iraq war. Iran developed chemical weapons in response to Iraqi use. They also used small quantities of poison gas captured from the Iraqis in 1987. Pear, *Can Words Stem a Flow of Chemical Weapons*, N.Y. Times, Jan. 8, 1989, at E2, col. 3.

177. The world must decide whether and how to punish breaching nations. Lack of sanctions in an international convention is not unusual because the options are limited. *Id.* at 266-267. Military sanctions are ineffective in areas, such as chemical weapons, that involve nuclear powers. *Id.* at 166, n. 36. Also, the effectiveness of economic sanctions is questionable. There are always countries who will trade with a sanctioned nation. The primary sanctions underlying all arms control agreements are political in nature, "consisting of negative reactions from the international community in which the noncomplying nation must continue to operate. *Id.* at 267.

178. HARRISON & ROBERTS, *supra* note 3, at 51.

179. *Id.*

180. West Germany is a major source of Third World chemical systems. The sale of chemical technology by West German and Japanese companies to Libya was exposed in 1988. The Central Intelligence Agency and the U.S. State Department prepared a secret report on the role of West German chemical firms in Libya. Lief, *The Uphill Fight to Contain Chemical Weapons*, U.S. NEWS & WORLD REPORT, Jan. 9, 1989, at 42. A State Department official says that West German companies have "assisted Iran, Iraq, and Syria in acquiring chemical-weapons capability." *Id.*

VI. Conclusion

The foregoing work was intended to survey international law regulating chemical weapons and apply that law to the Iraqis brutal use of chemical weapons against Iraqi Kurds. It is clear that Iraq has violated a number of conventions and rules, especially the humanitarian laws. However, the Kurdish situation demonstrated the glaring inadequacies of the current state of international law regulating chemical weapons. The massacre of the Iraqi Kurds was a horrible act. The world's silence made the massacre even more horrific. This Comment was also meant to inform the world of the Kurdish situation and of Iraq's guilt. Hopefully, with better information and more conviction, nations will not allow history to repeat itself.

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